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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALFREDO OSEGUERA,

Defendant and Appellant.

G046973

(Super. Ct. No. 10NF2663 )

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kevin Vienna and Heidi T. Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury found defendant Jose Alfredo Oseguera guilty of committing a lewd act on a 14-year-old child at least 10 years his junior. (Pen. Code, § 288, subd. (c)(1); all further unspecified statutory references are to the Penal Code.) Oseguera contends the trial court erred by not instructing the jury sua sponte on the lesser offense of misdemeanor sexual battery under section 243.4, subdivision (e)(1). For the reasons expressed below, we affirm.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

In August 2010, 14-year-old Karina R. lived with her mother, brother and her mother's boyfriend in an Anaheim apartment. Between 5:00 and 6:00 p.m. on August 25, Karina took the trash out to the apartment's dumpsters, one of her daily chores. Oseguera, age 26, approached Karina at an apartment gate as she returned home. She recognized Oseguera as a neighbor who had stared at her while she played with her friends. She had never spoken to him other than to say "hi."

Oseguera, without saying a word, grabbed Karina's arms, pushed her against the wall, and inserted his tongue into her mouth. She bit his tongue and told him to stop, but he maintained hold of her right wrist, squeezing her left breast and vagina over her clothing for approximately five to 10 seconds. Karina eventually freed her arms, pushed Oseguera in the chest, and walked back to her apartment. The ordeal lasted about 15 seconds. She did not tell anybody because she feared her mother would blame her.

The following night Karina took the trash out and again encountered Oseguera. He extended his arms to prevent her from walking past him. Karina said "excuse me" in Spanish, and Oseguera replied, "not until you give me a kiss." Karina said, "okay," and Oseguera put his arms down. Karina elbowed him and walked past

without kissing him. Karina's 10-year-old cousin witnessed the incident from the front lawn.

After she returned home, Karina spoke with her cousin about both incidents and he encouraged her to tell her mother. He said it was not her fault and she must tell someone or Oseguera would torment her "over and over again." Karina told her mother later that night.

On August 27, Anaheim Police Officer James Brown contacted Oseguera in the apartment courtyard and informed him about the sexual assault investigation. Oseguera first declared "he did not know anyone" from Karina's apartment, but admitted seeing Karina over "ten times." Nonetheless, Oseguera asserted "nothing happened," and he only said "hi" and "bye" to her. Oseguera described Karina as a 14- or 15-year-old "pesada," a Spanish slang term meaning "heavy set" or overweight. Officer Brown arrested Oseguera.

Detective Salvador Enriquez interviewed Oseguera about the incident with Karina. Oseguera claimed Karina initiated their encounter. He explained Karina entered the laundry room to talk to him, but she left when he told her he was doing his laundry. After finishing, Oseguera left to watch Disneyland fireworks from the alley. Karina found him at the gate, blocked his path, and said, "I'm not going to let you go until you give me a kiss." Oseguera replied, "[o]kay, then" and gave her a "thirty-second" kiss on the mouth. He "wanted to leave" but Karina said, "[n]o come here. Don't leave." Oseguera admitted he did not need to use the specific gate where he encountered Karina to get to his apartment, and in his excitement he touched her breasts and vagina over her clothes. Oseguera denied grabbing Karina's arms, explaining he could not do so because a "chubby" little boy and another "dark" girl were "right there."

The jury convicted Oseguera of committing a lewd act on Karina, but acquitted him of attempting to commit a lewd act the following day. The trial court sentenced Oseguera to two years in prison.

## II

### DISCUSSION

Oseguera contends the trial court erred in failing to instruct on misdemeanor sexual battery (§ 243.4, subd. (e)(1)) as a lesser included offense of felony lewd conduct (§ 288, subd. (c)(1)). We disagree.

The prosecution has broad discretion in deciding which charges to bring against a defendant and the “courts do not generally supervise [this] ‘purely prosecutorial function.’ [Citations.]” (*People v. Ceja* (2010) 49 Cal.4th 1, 7; *People v. Richardson* (2008) 43 Cal.4th 959, 1013.) Due process, however, imposes a sua sponte duty on trial courts to instruct the jury on a lesser *included* offense “when the record contains substantial evidence of the lesser offense, that is, evidence from which the jury could reasonably doubt whether one or more of the charged offense’s elements was proven, but find all the elements of the included offense proven beyond a reasonable doubt.” (*People v. Moore* (2011) 51 Cal.4th 386, 408-409 (*Moore*).) In contrast, “a trial court has no sua sponte duty to instruct on lesser related offenses.” (*People v. Lam* (2010) 184 Cal.App.4th 580, 583; *People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387 (*Valentine*) [“defendant has no right to instructions on lesser related offenses even if he requests the instruction and it would have been supported by substantial evidence”].) A lesser related offense is one closely related to the charged offense, and where the evidence provides a basis for finding the defendant guilty of the related offense and innocent of the charged offense. (*People v. Babaali* (2009) 171 Cal.App.4th 982, 1000.)

A lesser included offense is defined by one of two tests, the “elements” test and the “accusatory pleading” test. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) An offense is a lesser included offense under the “elements” test “if the statutory elements of the greater offense include all the elements of the lesser offense so that the greater offense cannot be committed [also] without committing the lesser offense.” (*People v. Cook* (2001) 91 Cal.App.4th 910, 918 (*Cook*).) An offense is a lesser included offense under the “accusatory pleading” test if the facts alleged in the pleading “describe the offense in such a way that, if committed as alleged, the lesser offense necessarily must have been committed.” (*People v. Cheaves* (2003) 113 Cal.App.4th 445, 454 (*Cheaves*).) An appellate court reviews the trial court’s failure to instruct on an assertedly lesser included offense under an independent or de novo standard of review. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

Application of the elements test here demonstrates misdemeanor sexual battery under section 243.4, subdivision (e)(1), is not a lesser included offense of felony lewd conduct under section 288, subdivision (c)(1). Section 288 defines lewd conduct as “any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child . . . with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child,” where the child is “14 or 15 years [old], and that person is at least 10 years older than the child.” (§ 288, subd. (a)(1) & (c)(1).) Misdemeanor sexual battery occurs when “[a]ny person [ ] touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.” (§ 243.4, subd. (e)(1).)

It is readily apparent that a lewd act on a child may be committed without committing a sexual battery. A lewd act can occur on any part of the body; misdemeanor sexual battery requires touching of an *intimate body part*. Lack of consent is not an element of section 288 violations; misdemeanor sexual battery must be *nonconsensual*. Unlike sexual battery, a lewd act on a child does not require either touching of an intimate body part or nonconsensual conduct. Thus, the greater offense of a lewd act on a child can be committed without committing the lesser offense of sexual battery. (*Cook, supra*, 91 Cal.App.4th at p. 918.)

As for the accusatory pleading test, count one of the information charged Oseguera with “willfully, lewdly, and unlawfully commit[ting] a lewd and lascivious act upon and with the body of Karina R., a child of fourteen (14) years of age and at least ten (10) years younger than the defendant, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the defendant and the child.” The information does not allege Oseguera acted without Karina’s consent or that he touched an intimate body part. The word “unlawfully” merely describes the act alleged violated the law, not that it occurred without the victim’s consent. As noted above, whether Karina consented to Oseguera’s touching is irrelevant under section 288. Nor does the charge allege Oseguera touched an intimate body part of the victim, a requirement for the commission of sexual battery. As noted above, a person violates section 288 by committing a lewd or lascivious act upon “any part” of the victim’s body with sexual intent. “Lewd” is defined as “sexually unchaste or licentious.” (Merriam-Webster’s Collegiate Dict. (10th ed. 1996) p. 669.) Oseguera therefore fails to satisfy the accusatory pleading test because he could commit the lewd act as alleged in the

information without necessarily committing misdemeanor sexual battery. (*Cheaves, supra*, 113 Cal.App.4th at p. 454.)

Oseguera asserts trial courts must instruct on lesser offenses “where there is evidence that would justify a conviction” on those lesser offenses. As noted above, there is no duty to instruct on lesser *related* offenses, even if supported by substantial evidence. (*Valentine, supra*, 143 Cal.App.4th at p. 1387.) Similarly, the trial court’s failure to instruct on sexual battery did not violate Oseguera’s federal due process rights. The right of a federal noncapital defendant to obtain instructions on a lesser offense is limited to the elements test, which compares only the statutory definitions of the two crimes. (*People v. Birks* (1998) 19 Cal.4th 108, 124.) As previously noted, Oseguera failed to satisfy the elements test.

Because *People v. Thomas* (2007) 146 Cal.App.4th 1278 held that battery is a lesser included offense of section 288, Oseguera reasons misdemeanor sexual battery also must qualify as a lesser included offense. Section 242 defines battery as “any willful and unlawful use of force or violence upon the person of another.” “[A]ny harmful or offensive touching” satisfies section 242’s element of unlawful use of force or violence. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961, overruled on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Any lewd act within the meaning of section 288 is necessarily a harmful or offensive touching. (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) *Thomas* held battery was a lesser included offense of section 288 because section 288 requires a harmful or offensive touching of the victim. As explained above, while section 288 may require a harmful or offensive touching that would constitute battery under section 242, it does not require a nonconsensual touching of an intimate body part. We also note the California Practice Guide on sex crimes lists

attempt, simple assault, and battery as lesser included offenses of section 288, but does not include misdemeanor sexual battery. (Couzens & Bigelow, Cal. Practice Guide: Sex Crimes (The Rutter Group 2013) ¶ 12:18, p. 12-109.) Oseguera therefore was not entitled to an instruction on misdemeanor sexual battery.

### III

#### DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.